Filed 5/1/12 P. v. Andaya CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>AUDI ALLAN ANDAYA,<br><br>Defendant and Appellant. | H036589<br>(Santa Clara County<br>Super. Ct. No. CC811051) |

## 1. INTRODUCTION

On October 1, 2007, Yu Ju Fan's worried coworkers alerted police that she could not be contacted. Upon doing a welfare check of Fan's residence, the police found Fan dead in the master bed, the victim of 34 knife wounds. Defendant Audi Allan Andaya, a friend of Fan's next door neighbor, was arrested for the crime nine months later.

A jury convicted defendant of first-degree murder (count 1; Pen. Code, § 187)[1] and first-degree burglary (count 2; §§ 459-460). Also, the jury found true that he personally used a knife (§ 12022, subd. (b)(1)), but found not true that the murder was committed while defendant was engaged in the burglary. (§ 190.2, subd. (a)(17).). At sentencing, the court imposed a sentence of 30 years to life, consisting of an

[1] Unspecified section references are to the Penal Code.

indeterminate term of 25 to life for the murder, with one consecutive year for personal use of a knife, and the midterm of four consecutive years for the burglary. The court stated that count 1 was "a separate act with a separate objective."

On appeal defendant argues that the sentence for the burglary should have been stayed, because the murder was committed to facilitate the burglary. We will affirm the judgment after concluding that there was substantial evidence that defendant intended not only to take the victim's property, but also her life.

## 2. TRIAL EVIDENCE

### A. The Victim

Yu Ju Fan, an accountant, lived alone in a house in Milpitas. Fan's adult daughter, Bei Hua Xi, who resided in Los Angeles, last spoke to her by telephone on Friday night, September 28, 2007. On Monday, October 1, 2007, Fan's coworkers were concerned when uncharacteristically she neither showed up at work nor called in sick. When they were unable to reach her by telephone, one coworker went to Fan's residence after work, and, finding the front door closed but unlocked, called the police.

Milpitas Police Officer Sean Heneghan responded to the call shortly after 6:00 p.m. on October 1, 2007. He and his partner went to the front door of Fan's house and announced a welfare check. They entered through the front door. The downstairs area was in a neat condition. Heneghan went upstairs, where there were three bedrooms. The left door of the double doors for the master bedroom was open. The blinds in the bedroom were closed. The bedroom was in a neat condition with comforters thrown over the bed.

It was not until Officer Heneghan approached the headboard of the master bed that he noticed black hair sticking out from underneath a comforter and blood spatter on the headboard, the wall, and the ceiling. Underneath the comforter, a blanket, and a sheet was the body of Yu Ju Fan, clothed in underwear and a T-shirt.

According to a forensic pathologist, Fan had suffered 25 stab wounds and nine incised wounds. He explained that "stab" is a technical term in that a stab wound is

deeper than it is wide, while an incised wound is longer than it is deep. The wounds were primarily to Fan's face and neck, with a few to her shoulders, both front and back.

Three stab wounds to her neck were potentially fatal. Two severed her right carotid artery, which carries blood to the brain. The third penetrated her larynx, which could cause choking on one's own blood. One stab wound completely penetrated her right hand. Her right forearm was stabbed twice. The pathologist could not say if some wounds were inflicted after Fan died.

Officer Heneghan saw no signs of a struggle in the master bedroom and no signs of forced entry at the residence. The garage was also in a neat condition. A car was parked in the garage. The garage light was on. Two knives were missing from a knife block in the kitchen. One knife was soaking in the nearby sink.

Fan's purse was on her dresser. Her wallet and cell phone were missing. Jewelry boxes in dresser drawers near the foot of the bed and in a nightstand were empty. Though her daughter was not familiar with all of her jewelry, she could recall that Fan owned a cross on a necklace.

### B. Defendant

Fan's next door neighbor was David Nguyen. On Saturday, September 29, 2007, defendant visited Nguyen and they played video games. In 2007, defendant socialized three to four times per week with Nguyen, often visiting his house, but these visits did not continue after the night Fan was killed.

Nguyen told a police officer who was investigating the murder two evenings later that, at 8:00 p.m. on the previous Saturday, he noticed Fan's garage door was open with a car in the garage and the light on. The neighbor across the street noticed the garage door open when he returned from picking up his wife at work around 12:15 a.m. on Sunday, September 30, 2007.

Fan's garage door was open when defendant left Nguyen's house early Sunday morning around 2:00 to 3:00 a.m. Defendant made a comment to Nguyen about it as he left. In a police interview, Nguyen recalled defendant saying in a joking way that "if that bitch did not close her door she may get robbed." At trial, Nguyen initially did not recall

defendant saying anything to him, but eventually acknowledged that defendant jokingly said something like, "if she doesn't close the garage she can get robbed."

Around 3:30 a.m. on Sunday, September 30, 2007, the neighbor across the street woke up and noticed that Fan's garage door was closed.

Sunday morning, September 30, Evelynn Tulud, a friend of defendant, was awakened by a knock on the door of her Fremont apartment in the middle of the night. It was not unusual for friends to drop by at all hours. She fell back asleep because her boyfriend responded to the knock.

When Tulud woke up, defendant was on the computer in her apartment. Tulud found a lot of jewelry in a coffee pot. It seemed Chinese, as there was jade on some of it and what looked like a Chinese character on one piece. She remembered a cross on a necklace.

Tulud testified that she and defendant went out that day in her boyfriend's car. Defendant offered to buy gas and then bought breakfast for them at a Burger King. Defendant paid at both places with a credit card. Tulud had not seen him with one before. Tulud told Sergeant Toffey that a Chinese female's name was on the card. Fan's credit card was used that day at a Chevron and a Burger King in Union City.

Defendant was scheduled to begin work at 1:00 p.m. that same day as a sandwich maker in a San Jose mall. He did not show up until 2:30 or 3:00 p.m., which annoyed his manager, Mark Anthony Torio, who is also defendant's cousin. Defendant told Torio he had stopped for gas.

According to Sergeant Toffey, Torio testified at the preliminary examination on July 9, 2009, that on Sunday, September 30, 2007, he prevented defendant from using a credit card to buy a sandwich at their place of employment because his name was not on the card. At trial in October 2010, Torio testified that an Asian name was on the card and that the incident occurred on Monday, October 1. The following day, October 2, 2007, Torio read the same name in the police blotter section of the newspaper as the name of a woman who had just been murdered.

After that weekend, defendant never returned to Nguyen's house, but they talked a few times. Once Nguyen expressed his concern about his next-door neighbor being killed. Defendant told Nguyen that he had nothing to worry about.

After defendant showed up with the jewelry, Tulud thought that his personality changed and he always seemed worried. Tulud helped defendant sell one piece of jewelry, a cross. Tulud did not see defendant much after that.

DNA analysts at the Santa Clara County Crime Lab studied a variety of potential DNA sources at Fan's residence. Fan's DNA was found in bloodstains in the master bedroom, the master bathroom, and the upstairs guest bathroom. In the drain stop of the guest bathroom was not only Fan's DNA, but that of an unknown man.

The coroner's office used two fingernail clippers to take clippings from Fan. A full profile of her DNA was found on the clipper that was used on her left hand. A partial profile of another person was also found on that nail clipper. Out of 15 autosomal loci there were foreign contributions at six loci. While this was not enough to positively identify defendant as the contributor of the DNA, there was a "strong likelihood" that he was. In the forensic community there is no higher degree of likelihood short of a positive identification. The probability that defendant was the source was over a million to one.

Defendant was arrested on July 9, 2008. He did not testify at trial.

### 3. JURY ARGUMENT AND SENTENCING

The prosecutor argued to the jury that the murder was of the first degree on two theories, felony murder and malice aforethought. To establish felony murder, "the People have to prove the following. The defendant committed burglary, that's what his intent was, and while committing burglary the defendant did an act that caused the death of another person. That is all that is required for first degree felony murder." Defendant entered the building with the intent to commit theft.

The prosecutor also argued that, to establish malice aforethought, the prosecution had to prove that defendant willfully, deliberately, and with premeditation intended to kill Fan. The evidence of that was that defendant took a knife from the kitchen before going upstairs. The number of stab wounds also showed an intent to kill.

After three and one-half days of testimony and four and one-half hours of deliberation, the jury convicted defendant Audi Allan Andaya of first-degree murder (count 1; Pen. Code, § 187) and first-degree burglary (count 2; §§ 459-460) and found true that he personally used a knife (§ 12022, subd. (b)(1)). The jury found not true that the murder was committed while defendant was engaged in the burglary. (§ 190.2, subd. (a)(17).

After trial, a probation report was prepared. It recommended sentencing defendant to an indeterminate term of 25 years to life for the murder, with one consecutive year for personally using a knife, and the upper term of six consecutive years for the burglary.

At the sentencing hearing, defense counsel argued against imposing a separate sentence for the burglary both because defendant was willing to settle the matter and because "it's potentially a 654 issue" in that defendant's intent was unknown, whether he went in to kill her or to burglarize her residence. The prosecutor argued, "it was pled as a burglary with intent to commit theft and that's what the jury returned. That would take away that 654 argument as what I think a common sense interpretation of what took place."

At sentencing, the court noted that defendant had "[n]o history of criminal involvement. And yet such a devastating act. Not just the burglary and the assault[,] but the brutal nature of the assault. The number of wounds. The brutality that was exerted against the victim. And whether were you [*sic*] in a drug-induced issue at that point, whether there were other issues, you are the one who knows what went down that night. And no matter how you look at it it is a horrendous act and warrants a most significant sentence." The court imposed the sentence described above, stating that the murder was "a separate act with a separate objective."

### 4. SEPARATE PUNISHMENT

Defendant asserts on appeal that, because Fan's murder was committed in order to facilitate the burglary, "the sentence for the burglary count should have been stayed pursuant to section 654."

Section 654, subdivision (a) states in part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The purpose of section 654 is to insure that a defendant's punishment will be commensurate with the defendant's culpability. (*People v. Kramer* (2002) 29 Cal.4th 720, 723.)

"The proscription against double punishment in section 654 is applicable where there is a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute within the meaning of section 654. The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one." (*People v. Bauer* (1969) 1 Cal.3d 368, 376.) "On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct." (*People v. Perez* (1979) 23 Cal.3d 545, 551, fn. omitted.)

It is generally a factual question for the sentencing court whether a defendant's multiple crimes involved multiple objectives. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) On appeal we defer to express or implicit determinations that are based upon substantial evidence. (Cf. *People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585; *In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

In some cases, on which defendant relies, when a defendant's objective of taking property by robbery, burglary, or theft is accomplished by means of assault or murder, appellate courts have concluded that the defendant should not be separately punished for the taking of property. (*People v. Meredith* (1981) 29 Cal.3d 682, 695-696 [victim shot to death while resisting a robbery]; *People v. Price* (1991) 1 Cal.4th 324, 492 [Attorney General conceded that victim was killed to facilitate taking guns from her residence];

*People v. Collins* (1963) 220 Cal.App.2d 563, 579 ["appellant's intent and objective in entering the Burger premises was the commission of a theft and the assaults upon Mr. and Mrs. Burger were merely incidental to that main objective."]; *People v. Niles* (1964) 227 Cal.App.2d 749, 755 ["taking into consideration the totality of the picture, defendant's actions comprised an indivisible transaction in which the offense of assault was merely incidental to but one objective, to burglarize Mr. Duncan's premises and avoid being apprehended by the law."].)

In other cases, however, appellate courts have upheld trial court findings that a separate intent was manifest in the assault or murder that was coincident with a taking. Assaults following the completion of robberies have been found to have a different consecutive objective or motivation. (*People v. Coleman*, *supra*, 48 Cal.3d 112, 162-163 ["The trial court could properly conclude that defendant committed the assault with the intent and objective of preventing the victim from sounding the alarm about the murder, and that this intent and this objective were separate from, not incidental to, the robbery" of the same victim]; *People v. Williamson* (1979) 90 Cal.App.3d 164, 172 [after armed robbery had ended, the defendant removed his gun from his pocket and aimed it at one of the victims in response to the victim's protest].

In *People v. Nelson* (1989) 211 Cal.App.3d 634, the appellate court upheld the imposition of terms for two assaults consecutive to a burglary term. In the course of a burglary, the two burglars encountered the two occupants of the house and engaged in a somewhat prolonged physical confrontation. The appellate court reasoned: "On this record, it is reasonable to infer, as we assume the trial judge did, that theft was not the burglars' only object and purpose. Rather, they deliberately chose to enter the McLeod residence while the victims were at home, knowing as they must that their presence reduced the chances of a successful theft, because separate and apart from thievery they intended to inflict physical harm upon the victims." (*Id.* at p. 639, fn. omitted.)

In yet other cases, the timing of the assault relative to the taking appears to be less important to the appellate courts than the necessity for the assaultive action. In *People v. Jenkins* (1987) 196 Cal.App.3d 394 (disapproved on another ground by *People v. Brown*

(1993) 6 Cal.4th 322, 336, fn. 12), the defendant brandished a handgun and demanded money. The defendant fired a shot at the victim when the victim initially denied having money and fired a second shot at the victim after collecting the victim's money. The appellate court concluded: "Appellant contends that both shots were fired with the same objective, to facilitate the robbery. We disagree. The second shot was completely unnecessary to the robbery, and appears to have been a gratuitous act of violence." (*Id.* at p. 406.)

*People v. Nguyen* (1988) 204 Cal.App.3d 181 (*Nguyen*) concluded that "substantial evidence supports the court's implied finding of divisibility. While Nguyen remained at the store's till, his crime partner took the victim into a back room, relieved him of his valuables, and then forced him to lie on the floor in an obvious attempt to forestall any resistance. Only after the clerk assumed that position did Nguyen's accomplice shoot him. [¶] This act constituted an example of gratuitous violence against a helpless and unresisting victim which has traditionally been viewed as not 'incidental' to robbery for purposes of Penal Code section 654." (*Id.* at p. 190.) "The defense nevertheless argues Penal Code section 654 bars multiple sentences here because the facts suggest the clerk was shot in order to eliminate him as a witness or to facilitate the assailants' escape. Perhaps; but at some point the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be considered to express a different and a more sinister goal than mere successful commission of the original crime." (*Id.* at p. 191.) "It is one thing to commit a criminal act in order to accomplish another; Penal Code section 654 applies there. But that section cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense." (*Ibid.*)

*People v. Sandoval* (1994) 30 Cal.App.4th 1228 quoted *Nguyen* with approval and upheld separate punishments for attempted robbery and attempted murder when the defendant shot the victim in the chest after the victim refused the defendant's demand for money. (*Id.* at pp. 1299-1300.)

*People v. Cleveland* (2001) 87 Cal.App.4th 263, 272 quoted *Nguyen* with approval and held: "Sufficient evidence existed for the court to conclude Cleveland harbored divisible intents in committing two separate crimes—robbery and attempted murder of Freeman. We do not agree with Cleveland that both crimes were committed pursuant to the intent to rob Freeman of his Walkman. As the trial court observed, the amount of force used in taking the Walkman was far more than necessary to achieve one objective. Cleveland repeatedly hit his 66-year-old feeble, unresisting victim on the head and body with a two-by-four board. Cleveland struck Freeman until the board broke and left him unconscious. While it is true that attempted murder can, under some circumstances, constitute the 'force' necessary to commit a robbery, here, it was not the necessary force." (*Id.* at pp. 271-272, fn. omitted.) "The finding Cleveland had separate and simultaneous intents is further bolstered by the evidence that Cleveland and Freeman had a history of negative interaction." (*Id.* at p. 272.)

We agree with this precedent that when a defendant's initial objective appears to be the taking of another person's property or money, evidence of violence or any other conduct by the defendant unnecessary to accomplish the taking may support a finding that the defendant developed a separate and different, though perhaps simultaneous, intent.

In this case, with no evidence of any prior history of interactions between defendant and Fan, it cannot be said that he harbored a longstanding desire to kill her. It is more likely that, consistent with his comment about her getting "robbed," he entered her house intending to enrich himself at her expense. However, because her car remained in her garage, he may have suspected that she was home when he entered her residence sometime after 2:00 a.m. In any event, there is evidence that defendant armed himself with a knife from her downstairs kitchen, either as a precaution or after seeing her asleep upstairs. A weapon was not needed to take property from a sleeping person. His most likely intent in arming himself was to increase his ability to disable or kill her in the event of a confrontation. Even if his initial intent in taking a knife was simply to facilitate his escape, the number of knife wounds, 34, reflects that defendant at some point was not

concerned simply with successful escape. Rather, the number of wounds is substantial evidence that he formed the intent to kill her. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 658-659; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552.)

Defendant argues "that the multiple stab [wounds] were necessary . . . 'to accomplish his goal,'" because only three of them were possibly fatal. As the trial court indicated, defendant knows more than the record reflects about what occurred during his fatal assault. We reject his premise that the evidence shows it was *necessary* for defendant to kill Fan in order for him to get away with her jewelry and credit card.

We conclude that there is substantial evidence that defendant, having embarked on the path of taking Fan's property, took a fatal detour when he formed and acted on the intent to kill her. Defendant's return to his initial path after killing her does not undermine the trial court's explicit conclusion that defendant entertained separate objectives that night. We cannot conclude as a matter of law that the killing was merely incidental to the burglary.

## 5. DISPOSITION

The judgment is affirmed.

_____
WALSH, J.*

WE CONCUR:

_____
PREMO, ACTING P.J.

_____
MIHARA, J.

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.